No. 353.

Brief of Cowen for P. C.

Filed Oct. 18, 1897.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE BARROW STEAMSHIP CO.,
Plaintiff in Error,

vs.

MICHAEL KANE,
Defendant in Error.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

ESEK COWEN,
Of Counsel.

Supreme Court of the United States.

THE BARROW STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

MICHAEL KANE,
Defendant in Error.

This is a question of jurisdiction certified to this Court by the Circuit Court of Appeals for the Second Circuit, and arising out of the following facts:

The plaintiff in error is a foreign corporation organized under the laws of Great Britain, engaged in the business of transporting freight and passengers from certain ports in the Kingdom of Great Britain and Ireland to the port of New York, and the defendant in error is a resident of the State of New Jersey. On or about the 13th of September, 1893, the defendant in error purchased, from an agent of the plaintiff in error in Ireland, a ticket for his own transportation from the port of Londonderry, Ireland, to the port of New York on the steamship *Devonia*, owned by the plaintiff in error. Owing to shallow water the *Devonia* lay at some

distance from the wharves at Londonderry, and defendant in error was taken to the steamer from the Town of Londonderry in a tender or small steamboat. While on the tender, as alleged in the complaint, the defendant in error was wrongfully assaulted by the servants and employees of the plaintiff, and sustained the injuries for which the action is brought.

These facts all appearing upon the face of the complaint, the plaintiff in error filed a special appearance for the purpose only of objecting to the jurisdiction of the Court, and thereupon demurred upon the ground that the defendant in error, being a non-resident of the State of New York, and the plaintiff in error, a corporation created under the laws of a foreign country, and the cause of action not having arisen within the State of New York, a court of the United States sitting in the territory of the State of New York had no jurisdiction of the person of the corporation defendant, or of the subject matter of the action.

The demurrer having been overruled by the Circuit Court, the plaintiff in error was compelled to answer, and the case came on for trial in the Circuit Court. Before the taking of testimony, however, the plaintiff in error moved to dismiss the case on the ground that it appeared on the face of the complaint that the Court had not jurisdiction of the action; and at the close of the whole case, the facts relating to jurisdiction as stated in the complaint having appeared upon the trial, the plaintiff in error renewed the motion. Both motions were denied, and the plaintiff in error duly excepted. The jury found a verdict for the defendant in error, and the plaintiff in error appealed to the Circuit Court of Appeals for the Second Circuit, which has certified the question of jurisdiction to this Court for instructions, the question so certified being:

"Had the Circuit Court jurisdiction to try the action and render judgment therein against the defendant?"

POINTS FOR THE PLAINTIFF IN ERROR.

I.

A foreign corporation cannot be sued at all, either in a State or Federal court, outside of the State or country by which it was chartered, except by its own consent, express or implied. There is no pretense of an express consent in this case. An implied consent, to be sued in accordance with the terms of a State statute declaring fair and reasonable conditions in respect thereto and the service of process, is given by doing business within the State enacting such statute.

1. In the case of Bank of Augusta *v.* Earle (13 Peters, 519), Chief Justice Taney gave first expression, in this Court, to the principle that the right of a corporation to *make contracts* or *bring suit* at all, in a State other than that where created, depended upon the consent of such State, and that such consent would be presumed to have been granted from the comity of nations unless such presumption be rebutted by some law or expression of policy to the contrary; and the Court held that this principle applied as between the several States of the Union.

It also became well settled early in the history of our laws, both in the State and Federal courts, that a foreign corporation could not without its consent *be sued* at all in a personal action outside of the State by which it was chartered.

McQueen *vs.* The Middletown Mfg. Co., 16 Johns., 5.

Peckham *vs.* North Parish in Haverhill, 10 Pick., 274.

Libbey *vs.* Hogden, 9 N. H., 394.

Moulin *vs.* Trenton Ins. Co., 24 N. J. L., 222.

St. Clair *vs.* Cox, 106 U. S., 350.

2. As it was obviously unfair, however, to the residents of a State, that a foreign corporation should be permitted to do business there without being subject to suit as to its business transactions within the State, several of the States, in order to meet this difficulty, passed acts declaring in substance that such corporations should be subject to suit in respect to their business transactions within the State, and brought into court by service of process upon their officers or agents within the State.

The effect of these acts was passed upon by this Court first in the case of Lafayette Ins. Co. *v.* French (18 How., 404). In that case an Indiana insurance corporation was doing business in the State of Ohio, in which there was a statute providing that insurance corporations should be subject to suit upon contracts made in Ohio by service upon the agent who had made the contract, or upon an agent authorized to make similar contracts. The Court said:

> "Now when this corporation sent its agent "into Ohio with authority to make contracts "of insurance there, the corporation must be "taken to *assent to the condition on which* "*alone such business could be there transacted* "*by them*, that condition being that an agent "to make contracts should also be the agent "of the corporation to receive service of pro- "cess in suits on such contracts."

The Court was cautious, however, and carefully limited the decision, the opinion of Chief Justice Taney saying further:

> "We limit our decision to the case of a "corporation acting in a State, foreign to its "creation, under a *law of that State*, which "recognizes its existence for the purpose of "making contracts there and being sued *on* "*them* through notice to its *contracting* "*agents*."

3. Statutes of the same general character were in time passed in nearly all the States; and it is matter of history that they were passed in order to make foreign corporations, doing business in a State, subject to suit there *in respect to such business*, and were absolutely essential to accomplish such purpose, because it had been fully settled by this and other courts that without such an act suit could not be instituted against such a corporation personally *in invitum, either in a State or Federal court.*

In the case of St. Clair *vs.* Cox (106 U. S., 350), the Court, referring to the history of these acts, say:

> "Formerly it was held that a foreign corporation *could not* be sued, in an action for the recovery of a personal demand, outside of the State by which it was chartered. * * * There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were therefore necessarily confined to the disposition of such property belonging to it as could there be found; and to authorize them, legislation was necessary. * * * This doctrine was the cause of much inconvenience and often of manifest injustice. * * * To meet and obviate this inconvenience and injustice, the Legislatures of several States interposed and provided for the service of process on the officers and agents of foreign corporations doing business therein."

This case involved the validity of a personal judgment of a court of the State of Michigan obtained by default against a foreign corporation upon service of an attachment upon an agent of the corporation within the State, pursuant to the State statute; but it did not appear that the corporation was doing business within the State. The Court held that the judgment could not be received as evidence in the Federal courts. Mr. Justice Field, by his full and comprehensive discussion of the case, makes quite clear the grounds upon which service

upon an agent of a foreign corporation, in accordance with these State statutes, is recognized by the Federal courts as giving jurisdiction. He states them, substantially verbatim, as follows:

> That, in respect to the manner in which State Courts can acquire jurisdiction to render a personal judgment against non residents, personal service of citation on the party or his voluntary appearance is, with some exceptions, essential to the jurisdiction; that the exceptions are, in proceedings to determine the status of citizens toward non-residents, and *where a party has agreed to accept a notification to others, or service on them, as citation to himself; that this doctrine applies with all its force to personal judgments of State courts against foreign corporations;* that a corporation of one State may not do business in another without the latter's consent, and such consent may be accompanied with conditions; that such conditions are valid and effectual, *provided* they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, *or that principle of natural justice which forbids condemnation without opportunity for defense;* that where a State permits foreign corporations to do business within its borders, and at the same time provides by statute that in suits against them *for business there done*, process shall be served upon their agents, such provision is a condition of the permission, and, inasmuch as a corporation even in its home State can act only through its agents, and serving process on its agents in other States *for matters within the sphere of their agency* is in effect serving process on it as much as if such agents resided in the home State, *therefore* such condition is not in its nature unreasonable and unjust, and corporations, by doing business within the State, are deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process; that such condition must not, however, encroach

upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it, *it must be reasonable and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation, i. e.*, those standing in a representative character to the company, whose duties are not limited to those of a subordinate employee or to a particular transaction.

4. There is a uniform series of decisions to the same effect, extending from Lafayette Ins. Co. *v.* French in the 18th of Howard to N. E. Life Ins. Co. *v.* Woodworth in the 111th U. S.

The principle is, perhaps, nowhere more clearly discussed and stated than in the case of United States agst. Am. Bell Telephone Co., 29 F. R., 17, in a very elaborate opinion by the late Mr. Justice Jackson. The Court there say:

"We think the decisions of the Supreme "Court have settled and established the propo- "sition that, *in the absence of a voluntary "appearance*, these conditions must concur or "co-exist in order to give the *Federal courts* "jurisdiction *in personam* over a corporation "created without the territorial limits of the "State in which the Court is held. It must ap- "pear as a matter of fact (1) that the corpora- "tion is carrying on its business in such for- "eign State or district; (2) that the business is "transacted or managed by some agent or "officer appointed by and representing the cor- "poration in said State; and (3) *the existence of "some local law, making such corporation, or "foreign corporations generally, amenable to "suit there, as a condition, express or implied, "of doing business in the State.* When the "local law expressly or by comity permits for- "eign corporations to do business in the State; "when it also provides for suit against them *in "a reasonable and proper manner, and within "the just limits of the State's power and au- "thority;* and when a foreign corporation "thereafter enters the State and transacts its "corporate business by means of resident

"agents coming within the terms of the local "statute, it may be found, and is liable to "suit there, in either the State or Federal "courts, by service of process on such agent."

In that case the question was raised by *plea in abatement to the jurisdiction*, the facts showing lack of jurisdiction not appearing on the face of the bill.

See also the following authorities:

Eaton *v.* St. Louis S. M. and S. Co., 7 F. R., 139.

Lung Chung *v.* Northern Pac. Railway, 19 F. R., 254.

Maxwell *v.* Atchison, &c., R. R., 34 F. R., 286.

Mohr Distilling Co. *v.* Ins. Co., 12 Fed. Rep., 474.

R. R. Co. *v.* Koontz, 104 U. S., 10.

N. E. Mutual Life Ins. Co. *v.* Woodworth, 111 U. S., 146.

In the case of *N. E. Mutual Life Ins. Co.* v. *Woodworth*, above cited, it is said:

"In the courts of the United States it is "held that a corporation of one State doing "business in another is suable in the courts "of the United States established in the lat-"ter State, *if the laws of that State so pro-"vide, and in the manner provided by those "laws.*"

5. Against this uniform and overwhelming weight of authority the industry of the learned counsel for the defendant in error has enabled him to cite two decisions of the Circuit Court, which apparently hold that the aid of the local law is not necessary to give the Federal courts jurisdiction *in personam* over a foreign corporation.

Wilson Packing Co. *v.* Hunter, 8 Biss., 429.

Hayden *v.* Androscoggin Mills, 1 Fed. Rep., 93.

The case of *Wilson Packing Co.* v. *Hunter* is based on a very obvious misunderstanding of *Railroad Co.* v. *Harris* (12 Wallace, 65). Judge Drummond correctly says that the act of Congress making foreign corporations *generally* liable to suit in the District of Columbia was not passed at the time the cause of action in *Railroad Co.* v. *Harris* occurred. From this fact he reaches the conclusion that the action was sustained without any aid from the local law. But a very slight examination will show that this conclusion was wholly erroneous. It is quite true that the action was not brought under the *general* law, making foreign corporations liable in the District of Columbia, but the Court based its decision *upon the special law, permitting the plaintiff in error to extend its road into the District.* The Court, on page 81 of the opinion, recognizes the general rule for which we contend in the most explicit language, and also says on page 84 that *that statute* "made the company liable to suit where this suit was brought."

The case of *Hayden* v. *Androscoggin Mills* above cited is not only partially based on the mistaken opinion in *Wilson Packing Co.* v. *Hunt*, but was expressly overruled in the same district in *Boston Elec. Co.* v. *Elec. Gas Lighting Co.*, 23 F. R., 839, in which Judge Colt says that the decision of Judge Lowell in *Hayden* v. *Androscoggin Mills* "is against the great weight of authority."

6. It is obvious from the foregoing decisions that the claim of defendant in error that these State statutes are not necessary to authorize suit by service on a *general agent within the State*, but are only necessary, and intended, to authorize service on an *inferior* agent, is altogether wrong.

II.

The condition imposed by a State act, to be valid and effectual, must be coextensive only with the permission granted; that is to say, the provisions for service must apply only to causes of action growing out of the business permitted and done within the State; and moreover the agent upon whom service is authorized should be one representing the company in such manner as to raise a reasonable presumption that service upon him will come to the notice of the company.

1. This is clear not only from the express declarations of Mr. Justice Taney in Ins. Co. *v.* French, and Mr. Justice Field in St. Clair *v.* Cox, but upon principle. A natural person being a non-resident cannot be subjected to a suit *in personam* by service on an agent, and a State Act so providing would be ineffectual, because opposed to principles of natural justice, which require notice and an opportunity for defense; but precisely the same principles obtain in the case of a foreign corporation, which is entitled to notice and an opportunity for defense the same as a natural person, and whose rights in that respect a State Legislature may not disregard. A natural person in a foreign State is as much a person and as amenable to suit as at home; but it was held that a corporation ceased to be a corporation, so that it became necessary to obviate in some manner the injustice arising from this fact, and inasmuch as notice to a corporation must in any event be by notice to its agents, no violence is done to principles of natural justice by providing for service upon an agent. But natural justice may not be disregarded in the selection of the agent upon whom service is to be authorized, and he should be one whose relations to

the corporation are such as to render it probable that its officers will receive notice. It is submitted, therefore, that notice to an agent in a foreign country is in no case proper notice except in respect to transactions in such country; that there is not any reasonable presumption that the officers of a corporation will ever receive notice of a suit brought in the courts of some remote country, in respect to matters which did not take place there, merely by service on a local agent who represents the corporation only in respect to local matters, and is without any knowledge, authority, duties or responsibility in respect to the matters in controversy. For this reason, if for no other, jurisdiction in a foreign country should be limited to transactions there.

2. Moreover, even in cases where the State act does not expressly limit the operation of the conditions imposed, to suits growing out of the business done within the State, it is impossible to *imply* any broader *consent* than this on the part of the foreign corporation. The act, as we have seen, was remedial, to obviate the inconvenience and injustice arising from the fact that those having business transactions with the company within the State could not call it to account as to those transactions in the courts of the State; and it cannot be *presumed* that the act intended to impose, or the company to assent to, any condition except in respect to such business.

So long as all the business of the corporation was transacted outside of the State, no reason existed why the State should seek to extend its jurisdiction to its affairs, nor was there any hardship or injustice for the citizens of the State or others within its borders, in the fact that the courts of the State could not adjudicate as to its affairs. Yet by the corporation's transacting some of its business within the State, the situation is not changed *except as to such business*, and no greater reason exists than before, why the courts of the State should now adjudicate

as to the transactions of the company in all the four corners of the earth. It certainly cannot be *presumed* that the State intended to impose any such condition, or the corporation to assent to it.

In the case of New York State, however, it would be merely arbitrary and absurd to hold, because an act provides that as a condition of doing business there a foreign corporation shall submit to suit there when by a *resident* or as to its *business done there*, that, therefore, by availing itself of the permission the corporation *impliedly* consents to be sued by a *non-resident* and as to its *business not done there*.

3. Counsel for defendant in error contends, however, that some how or other, the Federal courts are not bound either by the terms of the State act, or those principles of natural right and justice which they have themselves formulated, and that, therefore, whatever might be the case in a State court, the United States Circuit Court may give notice to some local agent of a foreign corporation, and thereupon proceed to settle the affairs of the company all over the globe.

On the contrary, the United States Circuit Court is, as we have seen, quite as dependent on the State statute as the State courts, and it cannot entertain a suit against a foreign corporation under such an act in any case where a State court could not, and *for the same reasons*.

A Circuit Court of the United States is a local court within the State, appointed to administer within its district, not only the matters over which it is given exclusive cognizance, but also the laws of the State within which it is located. Irrespective of its exclusive jurisdiction, it is a court of the same but no greater jurisdiction than the State courts of general jurisdiction. The Act of March 3, 1887, provides that the Circuit Court shall have cognizance of all *suits* at common law or in equity, in which there shall be a "controversy between citizens of a

State and foreign States, citizens and subjects," and merely creates a court having the same jurisdiction, within the limitation as to citizenship, over such suits as any State court of general jurisdiction in law and equity, and no greater. The act relates solely to jurisdiction of the subject matter and does not undertake to say when the foreign subject or citizen can be brought into court *against his will*. If the statute had the comprehensive effect claimed for it by counsel for defendant in error, then it would not be necessary for a foreign corporation to give any consent, express or implied, to be sued out of the State of its creation; it would not be necessary for a State to impose conditions on such a corporation doing business within its limits; it would not even be necessary for the corporation *to do business* in the State where sued.

The reason why the Federal court is bound by the terms of the State statutes and cannot entertain suit thereunder, except where a State court could, is the same as that which enables it to avail itself of the provisions of the act in order to obtain jurisdiction. It is certain that some legislation imposing the necessary conditions is required in order to raise the implied consent. It is not competent for the Federal Government to dictate to the State upon what terms, if at all, it shall admit foreign corporations. The State Government alone can prescribe that. It may be conceded that the Federal Government can legislate in the case of foreign commerce, but even then it is well settled that legislation such as that in question would, in the absence of federal legislation, be effective and binding and constitute the law on the subject. So that although the Federal courts may enforce the law, they are also bound by it in the same manner as the State courts, *because it is the law for both*.

In the case of *Ex Parte* Schollenberger (96 U. S., 369), where the State act expressly limited jurisdiction to suits brought "in a Court of the Commonwealth," this Court felt obliged in order to

maintain its juridiction to hold that the United States Circuit Court was "a court of the Commonwealth" within the intention of the act.

III.

The plaintiff in error by merely doing business in the State of New York, did not consent to be sued by a non-resident of that State upon a cause of action which arose in Ireland.

1. The Legislation in the State of New York is contained in its Code of Civil Precedure, and is as follows:

Section 1780 of said act, which (omitting the clauses which have no application to this case) provides as follows:

"An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident in one of the following cases only.

"3. Where the cause of action *arose within the State*, except where the object of the action is to affect the title to real property situated without the State."

And Section 432 of the same act, which treats with some detail of the mode of serving process on a foreign corporation in the class of cases *wherein an action can be maintained*. For though not stated in so many words, this is the plain meaning of the section. The two sections are part of the same statute, and the same system of procedure, and must be read together. The New York courts so hold.

Section 1780 must be read as though the words were added, "*and in such actions service of process must be made as provided in Section* 432."

Section 432 must be read, "Personal service of a summons upon a defendant being a foreign corpora-

tion, *in an action authorised by* § 1780, must be made by delivering a copy thereof within the State as follows."

Indeed, it would be absurd in the last degree to solemnly provide for service of process in a class of cases in which the same statute declares that an action shall *never be maintained*.

The State of New York has, therefore, imposed this condition upon a foreign corporation doing business within the State. That it shall consent to be sued upon any cause of action by a resident of the State, and *by a non-resident only where the cause of action arose within the State*. No foreign corporation, by doing business in the State of New York, consents to be brought into either a State or Federal court, upon a suit by a non-resident, upon a cause of action arising in a foreign State or country.

Chapter 5 containing Section 432, provides for the manner of commencing any civil action.

Chapters 6 to 14 inclusive, regulate other matters of practice in such actions.

Whilst Chapter 15 containing Section 1780, prescribes limitations in respect to matrimonial, real estate and certain other actions as to which each State has the right to legislate, and as to which it is usual for it to do so. The provisions of this chapter are not either expressly or by inference limited to State Courts, but are general, and provide the law as to such actions for both the State and Federal Courts.

The Courts of New York State uniformly declare that inasmuch as the Code of Civil Procedure is a single act embodying a homogeneous scheme of legislation, its several sections must be construed together with reference to each other. The same rule applies in the Federal Courts.

In the case of *Maxwell* v. *Atchison*, 34 Fl. R., 286, Mr. Justice Brown says: "It does not appear to me that the law of this State with respect to foreign corporations cuts any figure in the case, since it provides for service of process upon the agent of a

foreign corporation *only when the* cause of action arises within the State" (p. 287).

In the same case the learned Judge quotes with approval Judge Jackson's opinion in United States *v.* Bell Telephone Company, above cited, and adds: "It is evident that this ruling is fatal to the maintenance of this case, as by the State law jurisdiction is given over foreign corporations only where the cause of action arose within this State."

2. Nor is the force of this argument at all weakened by the concession, which is freely made, that the Circuit Court would have had jurisdiction of this action, upon a *voluntary appearance* and submission to suit by the defendant below. It would have had jurisdiction of the subject matter, and jurisdiction of the *person* can always be conferred by *consent*. The State of New York cannot define the *class of controversies* which the Federal courts shall have jurisdiction to try. It *can* define the class of cases in which a foreign corporation, by doing business in the State, shall be deemed to have *consented* to be sued by hostile process, and this definition is a limitation upon the Federal as well as the State courts.

The State has defined such class of cases, and it does not include this action, which is brought by a non-resident of New York, and which arose in a foreign country. It is hardly necessary to argue that a cause of action for an assault committed in Ireland did not arise within the State of New York (Robinson *v.* Oceanic Steamboat Co., 112 N. Y., 321).

3. It is quite probable that the learned counsel for the defendant in error, as well as the learned Circuit Judge, misconceived the effect of the decision of this Court, *in re Hohorst* (150 U. S., 653). That case decides nothing contrary to the position of the plaintiff in error on the present appeal. The Court did not *intend* to make such a decision and the

question was not presented. In the Hohorst case *a resident of the State of New York* had sued an alien corporation doing business in that State. By doing business in the State the corporation had impliedly consented to be sued in any court, State or Federal, within the limits of the State of New York, *as provided by the Legislature of that State*, and the plaintiff being a *resident*, the case came directly within the terms of the New York Code.

The only question in the Hohorst case was whether or not the Act of March 3, 1887, as amended by the Act of August 13, 1885, which forbids the bringing of suits in any other district than that of which the defendant is an *inhabitant*, had any application to *alien* citizens or subjects. This Court held that the true construction of the statute was as though it had read, "where a defendant *is an inhabitant of any judicial district within the United States*, such defendant shall not be sued by original process in any other district."

In other words, this Court held that an alien citizen or corporation *could be sued in exactly the same manner as before the passage of that Act*. It did not pass upon any question involved in this case. And this Court in the Hohorst case, held that the action was sustained under the law of New York, because it cites the Code of that State to show that service was made on the proper agent of the defendant.

From this case the plaintiff's counsel in some inscrutable way deduces the conclusion that the United States Circuit Court would have *no* jurisdiction in Patent, Admiralty or Bankruptcy cases against a foreign corporation if our contention is correct.

But there is no difficulty in dividing those cases into those where the cause of action arose *within* and those where the cause of action arose *without* the State. In one class of cases the United States Courts could gain jurisdiction by service on an agent,

in the other they could not. In the earlier case *In re Louisville Underwriters* (134 U. S., 4 88), it was held that the service was good *under the State* law. The Court said that it would be good in an action at law and that no reason could be suggested which it should be good in admiralty. In that case the question was whether under the Act of 1887, the service was void, because the defendant was not an *inhabitant* of the district of Louisiana. The cause of action arose within the State.

4. The case of *Bank* v. *Mixter* (124 U. S., 721) bears with great force upon the question whether Sect. 432 of the New York Code requires a foreign corporation to consent to be sued in the *Federal* courts, in a class of actions which the same statute declares shall not be brought against it. In *Bank* v. *Mixter* the U. S. Circuit Court had issued an attachment against the property of a national bank before judgment.

Section 915 of the Revised Statutes had contained a general provision that the Circuit Courts of the United States might issue attachments in common law causes against the property of a defendant, "*as provided by the laws of the State in which such court is held for the Courts thereof.*" In 1873, Congress adopted an amendment to the National Banking Law, which is now part of Section 5242 of the Revised Statutes, and reads as follows: "No attachment, injunction, or execution, shall be issued against such [banking] Association, before final judgment in any suit, action, or proceeding, in any State, County, or Muncipal court." The Court below held that though State courts no longer had the power to issue attachments against National Banks, there was nothing to prevent the United States courts from doing so. But this Court said that after the passage by Congress of the amendment of 1873, the State attachment laws must be read as though they contained an express declaration that they did not apply to National Banks.

Now, in the case before the Court, there has existed for many years, not a law of Congress, but a well settled and recognized rule of the Federal courts, that they will entertain suits upon original process against foreign corporations only where the State in which the Federal court is sitting, has conferred a similar power upon the State courts. The New York Legislature passes a law forbidding the issue of process against a foreign corporation, in favor of a non-resident of the State, where the cause of action did not arise within the State. It seems to me that under the case of *Bank* v. *Mixter* this law of the State of New York produced the same effect as to foreign corporations that the Act of Congress of 1873 produced as to National Banks. Having availed themselves of an authority granted by the State the Federal courts lose that right when it is denied by the State. It makes no difference that in one case the right is taken away by a law of Congress, and in the other by a State statute. The point is that the right of the Federal courts depends on the right granted bo the State, and when the latter right is taken away the former falls with it.

IV.

The question of jurisdiction was properly raised by the demurrer of the defendant below, and after the same had been overruled in the Circuit Court, said defendant was not bound to risk the entire case upon the demurrer and suffer judgment to be entered against it. It might, as it did, answer and again raise the question upon the trial.

1. The suggestion, rather than argument, of the defendant in error that the answer amounted to a *general appearance* in the action does not require

much discussion. The defendant below gave notice that it appeared solely for the purpose of raising the question of jurisdiction, and demurred for want of jurisdiction. The effect of a general appearance rests upon the ground of *waiver*, and we submit that after a litigant has taken a jurisdictional objection in the proper way, presented it to the Court and had it formally overruled, he does not *waive* anything by defending the action upon the merits.

South Pacific R. R. *v.* Denton, 146 U. S., 102.

See also U. S. *v.* Telephone Co. (29 F. R., 17), where the same question was raised by plea in abatement.

2. The action was brought in the Southern District of New York. The complaint alleges that the defendant below is a foreign corporation, that the plaintiff below is a resident of New Jersey, and that the cause of action arose in Londonderry, Ireland. Upon its face it shows all the facts which makes it non-suable in the State of New York, *in the absence of an express consent*. No such consent was alleged in the complaint, or proved upon the trial. But the counsel for the defendant in error, if I understand his position correctly, claims that the Court will upon demurrer *presume* that the defendant has *expressly consented* to be sued in the Circuit Court. I submit that no such presumption exists, and that the question raised by the demurrer was not whether the proper means were employed to bring the defendant below into court, but whether it could be sued at all, *without its own consent*, which was not alleged. The plaintiff below practically conceded this by inserting in his complaint allegations that the defendant did business in the State of New York, and had a resident agent. These allegations were intended to show an *implied* consent to be sued. If there was an *express* consent, it was the duty of the plaintiff below to allege it.

3. This case is an action at law, and, therefore, governed by the New York practice.

Subdivision 1 of Section 488 of the New York Code authorized a *demurrer* by the defendant *for want of jurisdiction of his person.*

Now, if the argument of the counsel for the defendant in error is sound, this provision of the Code is nugatory, and this ground of demurrer *never existed.*

For, as *consent* will always give jurisdiction of the *person*, if it is true that the Court will, on demurrer, *presume* a consent of the defendant to be sued in that action, it is clear that no demurrer for want of jurisdiction of the person of the defendant can ever prevail. Of course, the effect of a demurrer for this cause is to raise the objection that the complaint does not show facts authorizing the defendant to be brought into that court *without his consent.*

4. The case of *South Pacific Co.* v. *Denton* is authority for the exact practice pursued in this case. In that case a resident of the Eastern District of Texas brought an action against the defendant in the Western District of that State for a personal injury. The defendant *demurred*, on the ground that it appeared upon the face of the petition that the action should have been brought either in the State of *Kentucky*, where the defendant corporation was organized, or in the *Eastern* District of Texas, where the plaintiff resided. The demurrer was overruled and the defendant answered to the merits, and judgment was recovered against it. It then appealed to this Court, which reversed the judgment, holding that the question was properly raised by *demurrer*, and that the defendant waived nothing by answering to the merits after the demurrer had been overruled, citing *Harkness* v. *Hyde*, 99 N. Y., 476, 479.

The Denton case was a demurrer to the Court's jurisdiction of the person of the defendant, and presented an excellent opportunity for applying the

doctrine of the defendant in error that on a demurrer for that cause, the Court will *presume* the *consent* of the defendant to be sued in that action, for the Court said at page 206 that the exemption from being sued in any other district might be *waived*. According to the counsel for defendant in error the Court ought to have *presumed* a waiver, or an express consent.

V.

The position of the plaintiff in error is as follows:

1. A corporation cannot be sued *in personam* in a State, other than that of its creation, without its own consent, *express* or *implied*.

2. It can give an *implied* consent, by doing business in a State which has declared in what cases such corporation shall be suable, and has prescribed proper and reasonable methods for service of process on such corporation.

3. When express or *implied* consent has been given, it binds the corporation in the Federal as well as the State courts, but the authority of the Federal courts *depends* upon that given by the local statute.

4. The State of New York has conferred no authority upon any court to issue process against a foreign corporation, in an action where the plaintiff is a non-resident and the cause of action did not arise within the State. Neither the State courts nor the Federal courts, therefore, are authorized to issue process in such a case, *under the New York law*, and hence in this case the Circuit Court could not acquire jurisdiction of the person of the defendant.

5. The question was properly presented by demurrer as well as by the motions made on the trial to dismiss the case for want of jurisdiction.

The question certified to this Court by the Circuit Court for the Southern District of New York should be answered in the *negative*.

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